

June 4, 2014

Christine Dietrick  
City Attorney's Office  
990 Palm Street  
San Luis Obispo, CA 93401 -3249

Re: Your Request for Advice  
**Our File No. A-14-097**

Dear Ms. Dietrick:

This letter responds to your request for advice on behalf of San Luisa Obispo City Councilmember Dan Carpenter and City Manager Katie Lichtig regarding the conflict of interest provisions of the Political Reform Act (the "Act").<sup>1</sup> Please note that this letter is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict of interest laws such as common law conflicts of interest, or Government Code Section 1090. Finally, the Commission does not act as a finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 72.)

## QUESTIONS

1a. Can Councilmember Carpenter participate in his official capacity (in City meetings, staff briefings, or internal or external discussions regarding the anticipated project application), or otherwise use his official position to influence the actions of the City regarding the development of Assessor Parcel Number 003-601-006?

1b. If Councilmember Carpenter is precluded from the above activities involving the property as currently configured, could he participate or use his official position to make, participate in or influence decisions related to the project if the property were subdivided (without his participation) such that the property boundary of the parcel on which all development activities and uses would occur is more than 500 feet from Councilmember Carpenter's property boundary?

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

2. As the City Manager who lives in a neighborhood in the vicinity of the proposed project, but greater than 500 feet away from any property boundary of the proposed project, is Ms. Lichtig precluded from participating in her official capacity in City meetings, reviews, discussions, recommendations or actions on the proposed project, either at preliminary stages and/or once an application is submitted?

## **CONCLUSIONS**

1a and 2. Both officials have a conflict of interest and may not make, participate in making, or influence the decisions concerning Assessor Parcel Number 003-601-006. Moreover, when is the item is called for at a noticed public meeting, then both officials must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item.

1b. No. Based on the information provided, a conflict of interest would still exist even if the councilmember's property were beyond 500 feet of the legal boundaries of the site of the proposed project to create housing for adults with mental illness.

## **FACTS**

The County of San Luis Obispo owns Assessor Parcel Number 003-601-006<sup>2</sup>, which is located within the City of San Luis Obispo. In addition, there is property on which the County holds an easement and which provides access to the Parcel (hereafter we will refer to Parcel Number 003-601-006 and the easement that provides access to it collectively as the "Parcel"). Currently, there are several county administrative buildings located on the Parcel, including an old building, which was formerly a hospital, but is currently vacant and historic in nature, and which is commonly referred to as Sunny Acres.

The County would like to refurbish the Sunny Acres building so that it is returned to use, instead of remaining vacant. Transitions Mental Health Association ("TMHA") is a non-profit organization that promotes the recovery and wellness for people with mental illness. Based on the City's understanding, TMHA and the County have entered into an agreement, which will allow for TMHA to purchase a portion of the County Property. The agreement requires TMHA to restore the exterior of Sunny Acres and remodel its interior into 13 studio units and a community room. TMHA also has the option of building up to three more buildings with 22 residential studios. Sunny Acres and the additional units would be used for permanent housing for adults with mental illness.

At this time, there is no formal project application for City approval from either TMHA or the County as it relates to Sunny Acres or the County Property. It is anticipated that the

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<sup>2</sup> You noted that the county also owns parcel 073-371-006, but that parcel is not at issue in your questions.

parties are at least one year away from being able to submit a project application for approval. The City's process would require that the work be done consistent with historic preservation guidelines.

On May 29, 2014, you provided the following additional facts:

"The County of San Luis Obispo built Sunny Acres in 1931 as a children's home to house orphans and other wards of the court. It is a large, two stories, and brick structure prominently situated in its hilltop location behind General Hospital (now closed, since 2003). The architectural style has been described as Lombard or Milanese Romanesque, which was popular in the 1920's. The style was widely used for academic buildings, with examples on the UCLA and USC campuses. The building was designed by William Mooser, whose firm also designed the Santa Barbara County Courthouse and Ghirardelli Square in San Francisco. The Sunny Acres building is the only example of this type of architecture in San Luis Obispo County. In the mid 1950's, minor interior remodeling was completed to accommodate a change of use to a County-run juvenile detention facility. It was used as such until 1974 when the County discontinued the use and the building has remained vacant since that time."

TMHA has represented that it will be conducting outreach in the neighborhood that surrounds the County Property seeking input on how to define the project. The initial reaction from residents in the neighborhood is to oppose a project as envisioned by TMHA based on expressed neighborhood concerns about potential behaviors and risks believed to be associated with the mental health clients to be served, including unpredictable behaviors presenting a safety risk to neighbors and passersby, and substance abuse issues. Specifically, as stated in communications from a group of neighbors, the concerns expressed about any proposed project of this type include:

- Inconsistency with current City General Plan;
- Impacts upon property values for existing residents and planned residential lots;
- Safety risks to neighborhood residents and children;
- Risk to existing child care facility;
- Changes to the character of the neighborhoods;
- Loss of current access to and use of the property by neighbors and visitors, including inability to use the property for exercising, animal walking, nature viewing, etc.; and
- "Poor use of a wonderful piece of property with fantastic views, large open space and good access to public transportation."

If TMHA does submit an application, based on information available at this time, the City anticipates that a project application may require a few different types of City approval.

First, the City anticipates that it would need to consider an application for a minor subdivision of APN 003-601-005 in order for the County to sell just a portion of the property to TMHA. The City further anticipates that to accomplish the subdivision, the project applicants would need to apply for an exception to the City's subdivision regulations, the approval of which requires Planning Commission review.

Second, any reuse of Sunny Acres would potentially require review by the City's Cultural Heritage Committee because of the historic nature of the building, and by the City's Architectural Review Commission for compliance with adopted design standards.

Any of the approvals that might be issued by the Planning Commission, Cultural Heritage Committee or the Architectural Commission could be appealed to the City Council. Consideration of such an appeal usually would involve the participation of the City Manager and the City Council. Typically, the City Manager participates in review of staff actions and prior advisory body determinations and makes a recommendation to the City Council, which then ultimately decides the appeal.

*The Officials' residences in relation to the County Property.* The distance between the nearest boundary of Councilmember Carpenter's residence to the boundary of the Parcel is less than 500 feet. However, Sunny Acres and all areas of potential development associated with the Sunny Acres project are more than 500 feet from the boundary of Councilmember Carpenter's residence.

Ms. Lichtig's residence is greater than 500 feet from the Parcel's boundaries. Moreover, you stated that due to the configuration of Ms. Lichtig's particular residence, its location in her neighborhood, and the usual access routes to her home, she does not believe there will be any impacts of a proposed project on her residence. As the City Manager, Ms. Lichtig typically would receive updates on project progress from staff, monitor, review and/or respond to public inquiries, review advisory body recommendations and/or decisions, and make recommendations on any actions coming before the City Council.

## ANALYSIS

Section 87100 prohibits any public official from making, participating in making, or using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step standard analysis for deciding whether an individual has a disqualifying conflict of interest in a given governmental decision.

Your letter eliminates the need to analyze the initial steps of the standard analysis. The Councilmember and the City Manager are public officials and you are asking whether they may

make or participate in the Parcel decision in light of the fact that both officials own residences in proximity to the Parcel.

**Materiality and Foreseeability.**

Regulation 18705.2, as amended by the Commission at the April 2014 Commission meeting, provides in pertinent part:

“(a) Except as provided in subdivision (c) below, the reasonably foreseeable financial effect of a governmental decision (listed below in (a)(1) through (a)(13)) on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision:

“(1) Involves the adoption of or amendment to a general (except as provided below) or specific plan, and the parcel is located within the proposed boundaries of the plan;

“(2) Determines the parcel’s zoning or rezoning (other than a zoning decision applicable to all properties designated in that category), annexation or de-annexation, or inclusion in or exclusion from any city, county, district, or other local government subdivision, or other boundaries, other than elective district boundaries as determined by the California Citizen’s Redistricting Commission or any other agency where the governmental decision is to determine boundaries for elective purposes;

“(3) Would impose, repeal, or modify any taxes, fees, or assessments that apply to the parcel;

“(4) Authorizes the sale, purchase, or lease of the parcel;

“(5) Involves the issuance, denial or revocation of a license, permit or other land use entitlement authorizing a specific use of or improvement to the parcel or any variance that changes the permitted use of, or restrictions placed on, that real property. For purposes of this paragraph, any financial effect resulting from a governmental decision regarding permits or licenses issued to the official’s business entity when operating on the official’s real property shall be conclusively analyzed under Regulation 18705.1, rather than this paragraph, without any separate consideration for any material financial affects on the official’s real property as a result of the decision;

“(6) Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel in which the official has an interest will receive new or improved services that are distinguishable from

improvements and services that are provided to or received by other similarly situated properties in the official's jurisdiction or where the official will otherwise receive a disproportionate benefit or detriment by the decision;

“(7) Would change the development potential of the parcel of real property;

“(8) Would change the income producing potential of the parcel of real property. However, if the real property contains a business entity, including rental property, and the nature of the business entity remains unchanged, the materiality standards under Regulation 18705.1 applicable to business entities would apply instead;

“(9) Would change the highest and best use of the parcel of real property in which the official has a financial interest;

“(10) Would change the character of the parcel of real property by substantially altering traffic levels or intensity of use, including parking, of property surrounding the official's real property parcel, the view, privacy, noise levels, or air quality, including odors, or any other factors that would affect the market value of the real property parcel in which the official has a financial interest;

“(11) Would consider any decision affecting real property value located within 500 feet of the property line of the official's real property, other than commercial property containing a business entity where the materiality standards are analyzed under Regulation 18705.1. Notwithstanding this prohibition, the Commission may provide written advice allowing an official to participate under these circumstances if the Commission determines that there are sufficient facts to indicate that there will be no reasonably foreseeable measurable impact on the official's property; or

“(12) Would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its reasonably foreseeable effect would influence the market value of the official's property.”

*City Manager Lichtig:* None of the specific tests of materiality apply to City Manager Lichtig, except for the general tests in (a)(10) and (a)(12).

With respect to (a)(10), you noted that due to the configuration of Ms. Lichtig's particular residence, its location in her neighborhood, and the usual access routes to her home, she does not believe there will be any impacts of a proposed project on her residence. You did not provide the facts on which this conclusion was based.

However, even assuming that subdivision (a)(10) is not triggered, under the general test of (a)(12), it appears that the proposed use of the currently vacant building would cause a reasonably prudent person, using due care and consideration under the circumstances, to believe that the governmental decision was of such a nature that its *reasonably foreseeable*<sup>3</sup> effect would influence the market value of the official's property.

Regulation 18706 provides factors to consider in determining whether a decision in which an official's interest is not explicitly involved will have a reasonably foreseeable financial effect on the interest nonetheless:

(1) The extent to which the occurrence of the financial effect is contingent upon intervening events, not including future governmental decisions by the official's agency, or any other agency appointed by or subject to the budgetary control of the official's agency.

*In this case, there are future decisions that must occur by agencies other than the city. However, since the county has already agreed to the use, the most important intervening decisions would be the city's decisions. Therefore, this factor supports the conclusion of a conflict of interest.*

(2) Whether the public official should anticipate a financial effect on his or her economic interest as a potential outcome under normal circumstances when using appropriate due diligence and care.

*In other words, based on the circumstances surrounding the decision can the official expect a financial effect on the official's interest? In this case, the site in question has been vacant for 40 years (since 1974). The proposed change in use could result in 35 new single-family dwellings being constructed in proximity to the official's residence. The change of use alone should create an expectation that there will be a financial effect on the official's home.*

(3) Whether the public official has an economic interest that is of the type that would typically be affected by the terms of the governmental decision or whether the governmental decision is of the type that would be expected to have a financial effect on businesses and individuals similarly situated to those businesses and individuals in which the public official has an economic interest.

*Those persons similarly situated to the official have already voiced concern about the proposal, including the fact that there will be impacts upon property values for existing residents*

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<sup>3</sup> A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable.

*and planned residential lots; safety risks to neighborhood residents and children, risk to existing child care facility, and changes to the character of the neighborhood.*<sup>4</sup>

(4) Whether a reasonable inference can be made that the financial effects of the governmental decision on the public official's economic interest could compromise the public official's ability to act in a manner consistent with his or her duty to act in the best interests of the public.

*There is no dispute that this is the type of decision for which bias can be inferred. Effects on the value of the property could be dramatic, as well as effects on the use and enjoyment of the property based on concerns about the proposed use (whether warranted or not).*

(5) Whether the governmental decision will provide or deny an opportunity, or create an advantage or disadvantage for one of the official's economic interests, including whether the economic interest may be entitled to compete or be eligible for a benefit resulting from the decision.

*This factor does not apply to the facts.*

(6) Whether the public official has the type of economic interest that would cause a similarly situated person to weigh the advantages and disadvantages of the governmental decision on his or her economic interest in formulating a position.

*See discussion in nos. 2-4 above.*

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<sup>4</sup> Obviously, whether real property values will be affected is a factual determination. But the central question under the Act is not whether an official's property value is ultimately affected by the decision, but whether it is reasonably foreseeable at the time the decision is made that it would be. Courts have historically recognized that a use similar to that proposed here could negatively affect property values. For example, in *Park v. Stolzheise* (1946) 167 P.2d 412, 418, the court stated that "The factual issues in the case, as presented by the evidence at the trial, revolved around questions as to the character of the property in the immediate and general vicinity of the Buschmann property recently acquired by appellant; also, as to whether such surrounding properties would be depreciated in value by the establishment of a sanitarium for mental cases on the Buschmann property; and, further, as to whether the maintenance of such institution would destroy the peace, repose, and tranquility of the complaining property owners by producing a condition of fear among them for the safety and security of themselves and their children. There was voluminous testimony upon all of these questions, and, in our opinion, the great preponderance thereof fully substantiated the contentions and claims of the respondents.... 'The great preponderance of all the evidence in this case is to the effect that the property in question, as well as the water front property in this vicinity, is strictly residential, and of the highest and first class and that to permit the conversion of defendant's [appellant's] property into a sanitarium would materially depreciate the value of the property in this community. That to do so would destroy the peace, repose, tranquility and comfortable enjoyment which the property owners in this district have enjoyed for many years, and produce in its stead a very disturbing feeling of fear for their safety and security.' " See also *Wilkman v. Banks* (1954) 124 Cal.App.2d 451 [action to enjoin maintenance of sanitarium]; *Seaton v. Clifford* (1972) 24 Cal.App.3d 46 [same].



Therefore, the city manager would have a conflict of interest and could not make or participate in the decision.<sup>5</sup>

*Councilmember Carpenter:* You noted Councilmember Carpenter's residence is within 500 feet of the Parcel, but beyond 500 feet of the Sunny Acres building. In the past, we have said that in some circumstances, where the governmental decision affects a clearly defined, specific, and isolated site, such as a particular building on a large tract of land, "the Commission has interpreted the materiality regulations to allow the distance to be measured from that clearly defined and specifically affected portion." (*Ball*, Advice Letters, *supra*, and A-01-071, A-01-188, and A-01-279; *Kaplan* Advice Letter A-98-224; *Craven* Advice Letter, No. I-00-224; *Krauel* Advice Letter, No. I-92-118; *Ennis* Advice Letter, No. I-90-774; *Nord* Advice Letter, No. A-82-038.)

However, at this preliminary stage, there is no formal development application to confine the ultimate project to an isolated portion of the Parcel. Because the Commissioner's real property is within 500 feet of the Parcel and the affect of the governmental decision is not legally localized to a small area of the parcel, we would consider all the property as being foreseeably affected by the governmental decision. In addition, the same rationale discussed in connection with City Manager Lichtig and subdivision (a)(13) would also apply with respect to the Councilmember. This would also require disqualification.

## Exceptions

Even if a material financial effect on a public official's economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official's economic interest is indistinguishable from the effect on the public generally (Section 87103; Regulations 18700(b)(7) and 18707(a)) or the official is legally required to participate (Section 87103; Regulation 18708). You have provided no facts indicating that either of these exceptions applies.

Finally, we note that the Act does not prohibit the officials from representing their personal interests in their private capacity. Regulation 18702.4(b)(1) states that even if a conflict of interest is present, a public official may appear before his or her agency as any other member of the general public in the course of its prescribed governmental function in order to represent himself or herself on matters related solely to his or her interest in real property which is wholly owned by the official or members of his or her immediate family. Such an appearance, properly

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<sup>5</sup> Please note that when public officials who hold an office specified in Section 87200 (city council members and city managers) have a conflict of interest in a decision noticed at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, orally identify each type of economic interest involved in the decision as well as details of the economic interest, as discussed in Regulation 18702.5(b), on the record of the meeting; (2) recuse himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5(c) and 18702.5(d) apply.

made, does not constitute making, participating in making, or influencing a governmental decision. (Regulation 18702.4(a)(2) and 18702.4(b)(1).)

Under this exception, the officials must limit their comments to their personal interests and make clear that they are not speaking in the interest of any person or group, nor are they acting in their official capacity. (*Mitchell* Advice Letter, No. A-12-011.) Similarly, they may not discuss the decision with other council members or consultants outside of public comments made at any public meetings.

Finally, we note that a public official is not attempting to use his or her official position to influence a governmental decision of an agency if the official communicates with the general public or the press. (Regulation 18702.4(b)(2).)

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini  
General Counsel

By: John W. Wallace  
Assistant General Counsel  
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